United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

77-1481, 78-1001

ORIGINAL

To be argued by
SHEILA GINSBERG

B
P/S

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Respondent,

against

DANIEL SCOTT PALTER,

Appellant.

On Appeal from a Judgment of the United States District Court for the District of Connecticut

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REPLY BRIEF FOR APPELLANT, DANIEL SCOTT PALTER

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UNITED STATES COURT OF APPEALS
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Respondent.	Docket No. 78-1001
-against-	
DANIEL SCOTT PALTER, Appellant.	

REPLY BRIEF FOR APPELLANT DANIEL SCOTT PALTER

I

The Deficiencies in the Plea Proceeding Require That the Conviction be Vacated

Despite the mandatory language of Rule 11 and this Court's holdings in United States v. Alejandro, docket no. 77-1338, slip. op. 1517 (2d Cir. 1978) and United States v. Journet, 544 F.2d 633 (2d Cir. 1976), the government argues that the failure, in three substantial ways, to comply with the Rule does not require reversal. This argument is untenable. It is too late in the day for the government to press the harmless error rule. United States v. Journet, supra, 544 F.2d at 636 summarily disposed of that contention

stating:

> "Since a guilty plea amounts to a conviction which may have most serious consequences for the accused ... the acceptance of the plea cannot be dealt with in a hasty or cavalier fashion. Fundamental constitutional rights are at stake, the loss of which could hardly be classified as insubstantial or harmless. What is required is 'the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence,' Boykin v. Alabama, 395 U.S. at 243-44, 89 S.Ct. at 1712. To permit Rule 52(a) to be used as a means of bypassing the specific and detailed procedure prescribed by Rule 11 would be to frustrate and defeat Congress' expressed intention."

Nor can the government claim that there was substantial compliance with the Rule. The neglect to inform appellant of the maximum possible penalty -- the error which alone mandated reversal in United States v. Alejandro, supra -- was not, on this record, mitigated by anything else the Judge explained. Indeed, he reinforced the error. Not only did he fail to mention that appellant was exposed to a possible life-time special parole, what he said indicated the contrary, that the maximum term was only two years.[1]

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[1] Specifically Judge Zampano stated:

> "Has it been explained to you that in the two year special parole plan that I must impose a minimum mandatory sentence ..." (Palter App. at 15-16)

The judge said no more on the subject; therefore, the government distorts the record when it would have this Court believe that appellant was informed that he faced "at least a two year special parole." (Gov't. Br. at 12-13)

That appellant had legal training will not compensate for the deficiencies in the plea. The government's assertion that compliance with the Rule can vary with the sophistication of the defendant is simply contrary to the language and purpose of the Rule. According to United States v. Journet, supra, 544 F.2d at 635, Rule 11 was intended to set out a compulsory set of instructions as a means of determining compliance with the Rule. Consequently, the "Advice of Rights" set forth in subdivision (c) must be given to all defendants and that includes lawyers.

Moreover, on this record the mere fact of a legal degree will not support an inference that appellant had his own knowledge of the special parole term. Appellant was never a practicing lawyer and he had no past experience with the criminal law. Indeed, for the past four years he had worked exclusively in his family shoe import business. Surely, the intricacies of the special parole term, unfamiliar to many seasoned practitioners, were totally foreign to him.

For similar reasons, the Judge had to inform appellant that should he decide to go to trial, he would still have the right not to incriminate himself and the right to a jury trial. Advice as to the Fifth Amendment privilege was particularly critical here. Appellant, having already cooperated with the government, was likely to mistak-

enly assume that there was nothing left to his privilege. Indeed, the prosecutor, legal training notwithstanding, makes this very same mistake.[2] Of course, incriminating statements made in connection with an offer to plead guilty are inadmissible in any subsequent criminal trial against the person offering to plead. Rule 11 (e)(6); United States v. Herman, 554 F.2d 791, 795 (5th Cir. 1977); United States v. Brooks, 536 F.2d 1137 (6th Cir. 1976); United States v. Smith, 525 F.2d 1017 (10th Cir. 1975). Consequently, had appellant then decided not to plead guilty, he had remaining to him a very viable Fifth Amendment right. But appellant did not know that, and nothing Judge Zampano said disabused him of his misconception.

On these facts the failure of the plea proceeding to comply with the strictures of Rule 11 mandate reversal of the conviction.

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[2] The government brief at 13 provides:

> "...[Appellant] had already given a complete statement to the government as a part of his plea bargain, a statement in which he had already incriminated himself. Thus, under the circumstances such advice [of the privilege] would at best, have been superfluous."

II

Having Found that Appellant's Severe Psychiatric Problems Required Continued Therapy, the Judge Abused his Discretion When, Without Reason, He Imposed a Period of Incarceration Which Effectively Precluded His Own Sentencing Goals for Appellant.

In McGee v. United States, 462 F.2d 243, 247 (2d Cir. 1972), and most recently in United States v. Ramos, docket no. 77-1271, slip op. 1575 (2d Cir. 1978), this Court held that particular circumstances might require remand for resentence when the trial judge declines to give reasons for imposition of sentence. See also, United States v. Driscoll, 496 F.2d 252 (2d Cir. 1974); United States v. Valazquez, 482 F.2d 139 (2d Cir. 1973); United States v. Brown, 479 F.2d 1170 (2d Cir. 1973).

Appellant's challenge to the sentence imposed below is premised on the district Judge's failure to articulate reasons for rejecting a sentencing alternative that he conceded was compelled by appellant's severe psychological problems. Those problems, according to the uncontroverted evidence below, present a substantial risk that a straight period of incarceration will jeopardize appellant's mental stability, and, perhaps, his life. Appellant has a history of suicide attempts, and both his treating therapist and an examining psychiatrist predicted that incarceration, with the consequent hiatus in his treatment, would catapult

him back into a suicidal depression.

Moved by this evidence, Judge Zampano directed defense counsel and the probation department to determine if therapy was available at the Metropolitan Correctional Center (where appellant is to be incarcerated). Alternatively, he wanted to know if weekend service of the sentence was a viable means of administering this four month period of incarceration. Then, despite proof that psychotherapy would not be provided at MCC, while weekend service of sentence is routinely granted, Judge Zampano inexplicably denied that relief.

The government's argument, notwithstanding, this appeal is not a request to substitute appellate judgment on sentence for that of the district court. Rather, appellant's challenge is directed only to the district court's sentencing procedure which, by any fair standard, defies rational explanation. Having acknowledged appellant's desperate need for continued therapy and his particular vulnerabilities in a normal prison setting, the judge below should be required to give reasons for denial of the weekend sentence alternative. On this record, the judge's failure to explain the straight period of incarceration was an abuse of discretion.

CONCLUSION

For the foregoing reasons, and the reasons set forth in appellant's main brief, the judgment of the district court should be vacated, and the case remanded for repleading.

Dated: New York, New York
April 14, 1978

Respectfully submitted,

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Affidavit of Service by Mail

In re:

United States of America v Palter

State of New York
County of New York, ss.:

Gerald Green

being duly sworn, deposes and says, that he is over 18 years of age. That on April 14, 1978, he served 2 copies of the within Reply Brief in the above-named matter on the following counsel by enclosing said two copies in a securely sealed postpaid wrapper addressed as follows:

A.U.S.A. Harold James Pinkerstein, Esq.
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and depositing same in the official depository under the exclusive care and custody of the United States Post Office Department within the City of New York.

and depositing same at the Post Office located at Howard and Lafayette Streets, New York, N. Y. 10013.

Gerald Green

Sworn to before me this 14th day of April, 1978

Jack A. Messina

JACK A. MESSINA
Notary Public, State of New York
No. 30-2673500
Qualified in Nassau County
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